**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**CRIMINAL APPEAL No. 81 of 2005**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE J.R.VORA**

**HONOURABLE MR.JUSTICE M.R. SHAH**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**STATE OF GUJARAT**
**Versus**
**BABUBHAI AJIJKHAN PATHAN & ORS**

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**Appearance :**
MR KP RAVAL APP for Appellant
MR BC DAVE for Respondents

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**CORAM : HONOURABLE MR.JUSTICE J.R.VORA**

**and**

**HONOURABLE MR.JUSTICE M.R. SHAH**

**Date : 03/10/2007**

**ORAL JUDGMENT :(Per : HONOURABLE MR.JUSTICE J.R.VORA)**

1 Leave to Appeal granted. Appeal is Admitted. Learned Advocate Mr. B.C. Dave waives for respondents.

2 Instant Appeal is preferred by the State under Section 378 of the Code of Criminal Procedure against the judgment and order delivered by Joint District and Additional Sessions Judge, Fast Track Court at Modasa, District – Sabarkantha, on 9th of April, 2004, in Sessions Case No.221 of 2003, whereby present respondents, being accused of the Sessions Case, came to be acquitted by the Trial Court for the charges levelled against them under Sections 302 and 120(B) of the Indian Penal Code.

3 Learned APP Mr. K.P. Raval for the appellant State and learned Advocate Mr. B.C. Dave for the respondents requested this Court to hear the Appeal finally as the Record and Proceedings of the Trial Court are available with this Court and that they shall provide extra copies of the evidence recorded during the trial and the documents produced on record. Request is granted. Learned APP Mr. K.P. Raval for the State and learned Advocate Mr. B.C. Dave for the respondents were heard in detail in respect of this Appeal.

4 According to prosecution case, the incident occurred on 21st of October, 2001 wherein Babubhai Khatubhai Damor – complainant and brother of deceased Jagatbhai Khatubhai Damor were attending garbi at Meghraj Village near a temple of Goddess. They also watched garbi near Police Station at about 11.30 at night. One Bharat Kesha was also with the complainant Babubhai Khatubhai Damor and he informed complainant that deceased had conveyed that all of them should go home now. In the said garbi, according to prosecution case, all the accused were present and there was enmity between the accused and deceased on account of one Masiben, with whom, according to prosecution case, the deceased had some relations. It is the prosecution case that, before that, accused No. 1 had also some relation with this Masiben, and on account of this, accused No.1 was threatening deceased Jagatbhai that he would be done to death. According to prosecution case, in garbi, all the three accused had threatened deceased and complainant that a revenge would be taken by them on account of relation of Masiben with the deceased. While complainant Babubhai Khatubhai Damor and Bharat Kesha started to go home, they could not find Jagatbhai as well as accused in the garbi and, therefore, they went to village Bothivada and stayed a night at their grand parents. On next day early morning, at about 6.00 a.m. one Sayaba Khatu informed complainant that dead body of deceased

Jagatbhai was lying on road of the said village. Father of the deceased was informed and all of them went to the place where the dead body was lying and it was found that fatal injury was inflicted on right side of abdomen of Jagatbhai and blood was oozing. He had died and, therefore, a complaint came to be filed. Upon complaint, a crime came to be registered and investigation was carried out by PW-29 Babaji Chanduji Chouhan and thereafter PW-14 Kanubhai Jaychandbhai Choudhari and ultimately charge sheet came to be submitted in the Court of Judicial Magistrate, First Class at Modasa and a criminal case was registered. The said case was committed to the Court of Sessions as per the provisions of Section 207 of the Code of Criminal Procedure and was registered as Sessions Case No. 221 of 2003. The learned Additional Sessions Judge, Modasa, framed charges against all the three respondents on 4th of March, 2004 vide Exhibit – 5, to which each of the respondents pleaded not guilty and, therefore, all the respondents were put to trial.

5 Thereafter prosecution examined as many as 14 witnesses and produced on record voluminous documents to prove its case. On prosecution evidence being over, learned Trial Judge brought to the notice of each of the respondents the incriminating circumstances appearing against them in the evidence of the prosecution. Statement of

each of the respondents was recorded under Section 313 of the Code of Criminal Procedure wherein the defence of each of the respondents was of total denial. The learned Trial Judge thereafter heard the prosecution and the defence and came to the above conclusion and, hence, this Appeal by the State.

6 We have gone through the evidence recorded during the trial thoroughly and have re-appreciated the evidence to assess the reasons assigned by the Trial Judge for the acquittal. We have considered the vital features of the matter and reasonable probabilities arising out of the circumstances. We have taken into consideration the contentions raised by the appellant as well as the respondents in this Appeal. We have taken threadbare scrutiny of the reasons assigned by the Trial Judge for the acquittal.

7 It is an admitted fact that Jagatbhai met with homicidal death and for which the prosecution examined PW-9 Dr. Piyushkumar Bhalabhai Salvi at Exhibit-21 and according to him there were antimortem injuries on the abdomen of the deceased and internal injury consistent with the external injuries. According to Dr. Piyushkumar, cause of death was due to haemorrhagic shock, due to internal haemorrhage, due to sharp stab wound, which could be inflicted by both

edge sharp instrument. Though he has been cross-examined by the defence, but nothing was brought out that the death of the deceased was not homicidal. Therefore, the learned Judge rightly came to the conclusion that the death of Jagatbhai was homicidal.

8 Effective witnesses examined by the prosecution are complainant Babubhai Khatubhai Damor, Exhibit-15 and PW-4 Bharatbhai Keshabhai Damor, Exhibit-12, who had last seen deceased and the accused in garbi near police station and when they started to go home accused as well as deceased were missing from the same garbi. Appreciating the evidence of complainant, though on account of relationship of the deceased with Masiben, there was enmity between the deceased and the accused but neither the complainant nor PW-4 Bharatbhai Keshabhai Damor happened to be eye witnesses of the incident. PW-7 Babubhai Khatubhai Damor deposed to the extent that in the said garbi accused were present while deceased was also present. They had watched garbi for half an hour and at about 11.30 complainant was informed by Bharat Keshabhai that deceased Jagatbhai wanted to go home and thereafter they searched deceased but he was not found and accused were also missing from garabi. The learned Trial Judge noted the conduct of this witness that none of the witnesses cared for the absence of the deceased and instead they went to the house

of the grand parents and slept there and in the morning they were informed that Jagatbhai was found lying dead though complainant stated that in the said garbi accused had threatened the deceased, but while appreciating the evidence of Babubhai Khatubhai Damor, it becomes clear that this witness had not stated anything about the threat given by the accused to the deceased in First Information Report. Both these witnesses therefore are not useful to connect the accused with the crime even if it is assumed that there was enmity between the deceased and the accused on account of relationship of the deceased with one Masiben. That itself is not the circumstance to connect the respondents with the crime especially when it is found from the evidence of PW-4 Bharat Keshabhai that the accused were present in the garbi and deceased was also present, nothing had happened, and merely because, according to this witness, accused and deceased were missing from the garbi, would not lead to any inference that the accused had committed crime. Further, neither the complainant Babubhai Khatubhai Damor nor witness Bharat Keshabhai deposed that when they last met with the deceased, he was in company of the accused nor it is established through the evidence of any of these witnesses that the accused were in proximity of the deceased when they were last seen by any of these witnesses. The witnesses stated that about 500 persons were watching this garbi. Therefore, the evidence of these two witnesses

failed to connect the accused with the crime in any manner. PW-5 Khatubhai Pujabhai, examined at Exhibit–13, happened to be father of the deceased and he came to know about the death of the deceased in the morning. PW-8 Masiben Dineshbhai Thakarda, Exhibit-20, has been examined by the prosecution, but no reliance whatsoever could be placed upon her evidence. In her examination-in-chief she denied everything of her previous relationship with the accused No.1 and subsequent relationship with the deceased. While she was declared hostile by the prosecution she deposed before the police that she had stated that accused No.1 had come in her contact and they had developed relationship and thereafter also she had developed relationship with the deceased. She had also stated before the police that in garbi she also noticed accused and deceased, and accused conveyed to her that deceased Jagatbhai would be done to death at any time by them. However, when she was cross-examined by the defence again, in clear terms, she stated that she had no relationship either with the deceased or with the accused. She denied to have attended garbi on the fateful night and she gave a statement before the police because her relatives had threatened her. Thus, the evidence of this witness is totally not useful to the prosecution. PW-1 Balubhai Bhemabhai Rathod is an hostile witness and stated that he did not know Jagatbhai Khatubhai Damor. Otherwise also, even according to the prosecution

case, he was not an eye witness. Likewise, PW-2 Jayantibhai Arjanbhai and PW-3 Mohanbhai Galabhai Rathod are also the witnesses but they have also not supported the prosecution case. PW-6 Somabhai Arjanbhai, Exhibit -14, is the witnesses, to whom one Sayababhai informed about the dead body of the deceased lying on the road and he had gone to the road and had witnessed the dead body. PW-10 Ramabhai Dhanjibhai, examined at Exhibit – 28, is a panch of panchnama by which the clothes of the accused were attached by the police. This witness has not supported the prosecution case. PW-11 Babaji Chanduji Chouhan was the then PSI of Meghraj Police Station and he took over the investigation from the earlier Investigating Officer and submitted charge sheet. PW-12 Nanjibhai Manglaji, examined at Exhibit – 30 was the then PSO In-charge of Meghraj Police Station and on 22nd of October, 2001 he received a complaint of complainant Babubhai Khatubhai Damor, which was recorded by Mr. K.J. Choudhari, PSI. From that complaint, he registered the crime and investigation was entrusted to PSI Choudhari. PW-13 Kalasva Sardarlalji, examined at Exhibit – 32, is also a panch of panchnama by which the clothes of the accused were attached by the police. The panch has turned hostile. PW-14 Kanubhai Jaychandbhai Choudhari, examined at Exhibit-33 is the first Investigating Officer and he took charge of investigation of the crime on 22nd of October, 2001. He

recorded the statements of the witnesses, draw the panchnama of scene of offence and inquest panchnama, draw other panchanamas of attaching of clothes of the deceased and the accused. He forwarded the dead body for postmortem and muddamal articles were forwarded by him to Forensic Science Laboratory.

9 This is all is the evidence of the prosecution.

10 From the above evidence, the learned Trial Judge came to the conclusion that none of the witnesses deposed against any of the respondents involving any of the respondents in this crime because the case rests on circumstantial evidence. From the deposition of the complainant and witness Bharatbhai, the circumstance only could be established to the extent that the accused and the deceased were present in garbi and when they wanted to go home, on searching, none of them was found. In this respect, the learned Trial Judge noted that PW-4 Bharatbhai, who had seen the deceased last point in time, failed to establish that the deceased and the accused were in the company or within the proximity, as to be said to have been seen last together. Appreciating the other circumstantial evidence, the learned Trial Judge observed that though in muddamal articles like pant and other articles, blood group of `B' was found and that group pertains to

the deceased. However, the pant which was attached by the prosecution did not belong to the accused but belonged to the deceased. The other clothes which were attached by the police could not be proved beyond doubt that the said clothes were in fact attached by the police from the person of the accused. No weapon could be recovered from any of the accused during investigation and, therefore, the Trial Judge ultimately came to the conclusion to acquit the accused from the charges levelled against them.

11 This being an appeal against the acquittal, the scope of the appeal is limited and well explained by the Apex Court in AJIT SAVANT MAJAGAVI vs. STATE OF KARNATAKA, as reported at (1997) 7 SCC 110, in para – 16 as under :

> *(1) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it possesses while hearing an appeal against the order of conviction.*
>
> *(2) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial court, if the said findings are against the weight of the evidence on record, or in other words, perverse.*

*(3) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial court that the accused is entitled to acquittal.*

*(4) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the order of acquittal passed in his favour by the trial court.*

*(5) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.*

*(6) The High Court has also to keep in mind that the trial court had the advantage of looking at the demeanour of witnesses and observing their conduct in the court especially in the witness box.*

*(7) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.*

12 In view of above, while we scanned the reasons advanced by the Trail Judge, we have no hesitation to come to the conclusion that

the view taken by the Trail Court is possible and probable from the evidence recorded during the trial. By no stretch of reasoning, it could be said that the view taken by the Trial Court is perverse, manifestly erroneous, palpably wrong or demonstrably unsustainable. In appeals against the order of acquittal, even if legitimate second view is possible, the order of acquittal cannot lightly be interfered with unless the conclusions arrived at by the Trial Court are found by the appellate court perverse, manifestly erroneous, palpably wrong and demonstrably unsustainable.

13 In view of above, the judgment and order impugned in this Appeal warrants no interference and, hence, the following order :

"Appeal stands dismissed.

**(J. R. VORA, J.)**

**(M. R. SHAH, J.)**

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